

No. 15943 ✓

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

vs.

RICHARD HAROLD HANSEN, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.

FILED

MAY 14 1958

PAUL P. O'BRIEN; CLERK



No. 15943

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

vs.

RICHARD HAROLD HANSEN, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Certificate of Clerk to Transcript of Record on	22
Designation of Record on (DC).....	20
Notice of	18
Statement of Point on (DC).....	20
Statement of Points and Designation of Record on (USCA).....	23
Certificate of Clerk to Transcript of Record...	22
Designation of Contents of Record on Appeal (DC)	20
Adoption of (USCA).....	23
Indictment	3
Minute Entry of Jan. 16, 1958—Arraignment and Plea of Not Guilty.....	5

Motion to Dismiss.....	4
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	18
Order Granting Motion to Dismiss Indictment	6
Statement of Docket Entries.....	17
Statement of Point Appellant Intends to Rely Upon (DC)	20
Adoption of (USCA).....	23

NAMES AND ADDRESSES OF ATTORNEYS

KREST CYR,

United States Attorney for the
District of Montana,
Butte, Montana,

MICHAEL J. O'CONNELL,

DALE F. GALLES,

Assistant United States Attorneys
for the District of Montana,
Butte, Montana,

Attorneys for Appellant.

HAYDEN C. COVINGTON,

124 Columbia Heights,
Brooklyn 1, New York,

EARLE N. GENZBERGER,

411 Metals Bank Building,
Butte, Montana,

Attorneys for Appellee.

In the United States District Court, District
of Montana, Butte Division

Criminal No. 3762

UNITED STATES OF AMERICA, Plaintiff,

vs.

RICHARD HAROLD HANSEN, Defendant.

INDICTMENT

(Title 50 App. U.S.C.A. §462)

The Grand Jury Charges:

Count One

Richard Harold Hansen, a male person subject to the Universal Military Training and Service Act, registered as required by said Act and regulations promulgated thereunder, and thereafter he became a registrant of Local Board No. 7, said board being then and there duly created and acting, under the Selective Service System established by said Act, in the County of Cascade, in the State and District of Montana; pursuant to said Act, and the rules and regulations promulgated thereunder, Richard Harold Hansen was classified 1-AO, and was notified of said classification; and a notice and order by said board was duly given him to report for induction into the Armed Forces of the United States of America, on January 31, 1957, at Great Falls, County of Cascade, State of Montana, for forwarding to an armed forces induction station; and he

was duly forwarded to the Armed Forces induction station at Butte, Montana; and on the 1st day of February, 1957, at Butte, in the State and District of Montana, said Richard Harold Hansen did knowingly fail, neglect and refuse to perform a duty required of him under said Universal Military Training and Service Act, and the regulations promulgated thereunder, in that said Richard Harold Hansen then and there knowingly failed, neglected and refused to be inducted into the Armed Forces of the United States of America, as so notified and ordered to do.

REUBEN A. QUENZER,
Foreman of the Grand Jury.

KREST CYR,
United States Attorney.

[Endorsed]: Filed June 7, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant, Richard Harold Hansen, moves that the indictment be dismissed on the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States.
2. The indictment on its face shows the defendant was classified 1-A-O, and as such is exempt from the duty of being inducted into the Armed Forces but must be assigned to a non-combatant

unit as prescribed by the Executive Orders of the President of the United States.

3. That said indictment on its face shows that this defendant claimed exemption from combatant training in the service because of conscientious objections and that his claim was sustained by Local Board No. 7 named in said indictment, and by reason thereof and the provisions of Title 50 App. Sec. 456 (j), said indictment shows on its face that this defendant performed all of the duties he was required to perform under the Universal Military Training and Service Act, and that said indictment fails to disclose any duty prescribed by law which said defendant failed to perform.

EARLE N. GENZBERGER,

Attorney for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 16, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY

This cause was duly called for arraignment and plea this day, the defendant being personally present in Court, and Mr. Krest Cyr, United States Attorney, and Mr. Michael J. O'Connell, Assistant United States Attorney, being present and appearing for the United States.

Thereupon, on motion of Mr. Earle N. Genzberger, Court ordered that his name be entered as counsel for the defendant herein.

Thereupon a motion to dismiss the indictment was presented by counsel for defendant and ordered filed, whereupon said motion was duly argued by counsel for the respective parties, and by the Court taken under advisement.

Thereupon the defendant was duly arraigned and answered that his true name is Richard Harold Hansen, whereupon the indictment was read to the defendant. Thereupon the defendant entered a plea of not guilty to the offense charged herein, whereupon trial of the case was set for Thursday, January 23, 1958, at 10:00 a.m.

Entered in open Court at Butte, Montana, this 16th day of January, 1958.

DEAN O. WOOD,
Clerk.

In the United States District Court, District
of Montana, Butte Division

No. 3762

UNITED STATES OF AMERICA, Plaintiff,

vs.

RICHARD HAROLD HANSEN, Defendant.

ORDER

Defendant was charged with a violation of the Universal Military Training and Service Act (Title 50, App., U.S.C.A., Section 451, et seq.) by an in-

dictment which so far as is material here reads as follows:

“Richard Harold Hansen, a male person subject to the Universal Military Training and Service Act * * * was classified 1-AO, and was notified of said classification; and a notice and order * * * was duly given him to report for induction into the Armed Forces of the United States of America on January 31, 1957, * * * and on the 1st day of February, 1957, at Butte, in the State and District of Montana, said Richard Harold Hansen did knowingly fail, neglect and refuse to perform a duty required of him under said Universal Military Training and Service Act and the regulations promulgated thereunder, in that the said Richard Harold Hansen then and there knowingly failed, neglected and refused to be inducted into the Armed Forces of the United States of America, as so notified and ordered to do.”

Defendant moved to dismiss said indictment on the ground that it did not state an offense against the United States because on its face the indictment showed that defendant had been classified 1-A-O by his local board and that as a result of such classification he was exempt from the duty of being inducted into the armed forces of the United States by the provisions of Title 50, App., Section 456(j), which reads as follows:

“(j) Nothing contained in this title (Sections 451-454 and 455-471 of this Appendix) shall be construed to require any person to be subject to com-

batant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title (said sections), be assigned to noncombatant service as defined by the President * * *.”

Defendant's position in other words is that there is a difference between “induction into the armed forces of the United States” and “induction into the armed forces of the United States for assignment to noncombatant service”, and that having classified defendant in class 1-A-O, the local board was without authority to order him to report for induction into the armed forces of the United States, without limiting the induction to induction for assignment to noncombatant service only.

If defendant's position is correct, the indictment must be dismissed because no offense results from the disobedience by the defendant of an invalid order of the local board.

As appears from the indictment, the defendant was classified in class 1-A-O. No question is presented, and indeed no question could be presented at this stage of the proceedings, as to the validity of his classification. Section 1622.11, Selective Service regulations, defines class 1-A-O as follows:

“1622.11 Class 1-A-O: Conscientious Objector Available for Noncombatant Military Service Only.—(a) In Class 1-A-O shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.”

This section of the Selective Service Regulations brings a person classified 1-A-O by his local board within that provision of Title 50, App., Section 456 (j) above quoted reading as follows:

“Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President.”

Thus under both the Selective Service Regulations and the statute itself, the defendant by virtue of his class 1-A-O classification was available for induction for noncombatant military service only.

Noncombatant training and noncombatant service are defined by Executive Order No. 10028 as follows:

“1. The term ‘noncombatant service’ shall mean (a) service in any unit of the armed forces which is unarmed at all times; (b) service in the medical department of any of the armed forces, wherever performed; or (c) any other assignment the pri-

mary function of which does not require the use of arms in combat; provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

2. The term 'noncombatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons."

Turning again to the indictment we find it is charged that defendant was duly ordered to report for induction into the armed forces of the United States and that defendant did knowingly fail, neglect and refuse to perform a duty required of him under the act in that he knowingly failed, neglected and refused to be inducted into the armed forces of the United States.

It seems to the Court that "induction into the armed forces of the United States" means something different than "induction into the armed forces of the United States for assignment to non-combatant service only". This belief is borne out by the provision found at the beginning of the 6th paragraph of subsection (a), Section 454, Title 50, App., which reads:

"Every person inducted into the Armed Forces pursuant to the authority of this subsection¹ after

¹ Subsection (a) of Section 454 is the subsection of the Act which provides for the induction of persons into the Armed Forces. Thus any person inducted into the Armed Forces is inducted under the authority of said subsection. Section 456(j) of the

the date of enactment of the 1951 Amendments to the Universal Military Training and Service Act (June 19, 1951) shall, following his induction, be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than four months * * *."

This language furnishes a definition of the meaning of the phrase "induction into the armed forces of the United States"; it is a direction by Congress that any person entering the armed forces upon an unqualified induction is to be given full and adequate military training for service in the armed forces into which he is inducted, for a period of not less than four months. Certainly full and adequate military training for service in the Army, Navy, Marine Corps, Air Force or Coast Guard cannot be achieved through "training which is not concerned with the study, use or handling of arms and weapons".

The provision above quoted from subsection (a) of Section 454 was added to the Universal Military Training and Service Act by the 1951 amendments to the Act. The legislative history of the 1951 amendments further illustrates the Congressional intent that inductees into the armed forces under unqualified inductions be given full and adequate military training.

Act above quoted does not itself provide the authority for the induction of conscientious objectors into the Armed Forces, but provides merely that if they are inducted, they shall be assigned to noncombatant service.

House Report No. 271 of March 15, 1951, on the 1951 Amendments to the Universal Military Training and Service Act, which repeats in substance the Senate Report on the 1951 amendments (Senate Report No. 117, February 21, 1951) contains the following statement:

“Under the House bill, each person inducted into the Armed Forces must be given military training for a period of not less than 4 months. It should be noted that this applies not only to men under 19, but to all persons inducted. The proposed section requires 4 months of military training; and this does not include time spent in travel to a training camp or station.”

In the section by section analysis of the 1951 amendments, contained in the House Report, the following statement is made:

“The present Selective Service Act requires that individuals inducted into the Armed Forces shall be assigned to stations and units of such forces. The proposed addition to the present law requires that every person inducted into the Armed Forces be given full and adequate military training for a period of not less than 4 months. In addition, the proposed section prevents any person inducted into the Armed Forces from being sent into a combat area located on land for the first 6 months following his induction into the Armed Forces. During the 4 months’ training period persons inducted may not be assigned for duty on land outside the United States, its Territories and possessions (including the Canal Zone).”

The Court has found only a few cases which deal with this question. In *Shaddy v. United States*, 139 Fed. (2d) 754, Shaddy appealed from a conviction for a violation of the Selective Service and Training Act of 1940. Shaddy, classified as 1-A-O, refused to report for induction. At the trial it was stipulated between the United States Attorney and counsel for Shaddy that Shaddy was ordered to report for induction into the armed forces of the United States for noncombatant service. However, the order to report for induction was introduced in evidence and showed that the stipulation was erroneous in that Shaddy was ordered to report for induction into the Armed Forces of the United States for training and service in the army. On appeal, counsel for Shaddy, for the first time, claimed that there was a variance between the allegations of the indictment and the proof and with respect to this point the Court said:

“The contention is based upon the erroneous recital in the stipulation. The order of the local board directed Shaddy to report for induction into the army. It is true that a registrant classified as 1-A-O is subject to noncombatant service only. Nevertheless, such a registrant is subject to induction to a noncombatant division, such as, for example, the Medical Corps. 32 CFR 1940 Supp., Sec. 603.364. There was no variance between the allegations of the indictment and the proof.”

The *Shaddy* case, however, is distinguishable from the present case in that the Selective Training

and Service Act of 1940, under which Shaddy was prosecuted, did not contain the provision requiring that persons inducted into the Armed Forces be given full and adequate military training, which was inserted by the 1951 amendments to the Universal Military Training and Service Act.

Another case dealing with the question involved here is *United States ex rel. Weidman v. Sweeney*, 117 Fed. Supp. 739. In that case Weidman, classified as 1-A-O, was inducted into the Marine Corps, which has no noncombatant unit and no medical corps. Weidman performed various services in the Marine Corps, but finally departed from his station and was charged with desertion, and while awaiting military trial on the charge of desertion sought a writ of habeas corpus. The Court granted the writ and ordered Weidman discharged, holding that in effect his induction was invalid from the beginning because the Marine Corps, into which he was inducted, had no noncombatant units, no medical corps and that such other assignment as the Marine Corps proposed to give him had not been found acceptable to him prior to his induction, as required by clause (c) of the definition of noncombatant service above quoted.

Upon somewhat similar facts, the Court in *LaRose v. Young*, 139 Fed. Supp. 516, reached a different conclusion than did the Court in *U. S. v. Sweeney*, *supra*. However, it appears from the second paragraph of the opinion in the *LaRose* case that *LaRose* "was inducted into the army as a con-

scientious objector available for noncombatant military service only”, although the specific induction order had no bearing on the Court’s decision. It is clear, however, that if the indictment in the case at bar charged that Hansen “refused to obey an order of induction into the armed forces as a conscientious objector available for noncombatant service only”, the problem with which the Court is here concerned would not exist.

The Court is aware of the two opinions of the Court of Appeals for the Ninth Circuit in *Hopper v. United States*, 142 Fed. (2d) 167 and 142 Fed. (2d) 181. While the first Hopper opinion in that portion thereof covered by headnotes 1 and 2 could be considered authority for the view this Court takes of the case at bar, that opinion was wiped out by the second opinion of the Court en banc in the Hopper case. However, the grounds upon which the first Hopper opinion, in the portion thereof covered by headnotes 1 and 2, held the indictment invalid were not raised by Hopper in either the trial or appellate court, and the second Hopper opinion limited its consideration of the sufficiency of the indictment to those grounds specified in the trial and appellate courts, and the problem with which the Court is here faced was not considered in the second Hopper opinion.

The Court is likewise aware of the line of authority represented by *Seele v. United States*, 133 Fed. (2d) 1015, and *United States v. Ryals*, 56 Fed. Supp. 772, cited by the government, to the effect

that an indictment founded on a statute need not negative the matter of an exception made by a proviso or other distinct section of the statute. The problem here involves something more than an exception, however. Here, the indictment, by the allegation that defendant was classified 1-A-O by his local board, affirmatively shows that defendant, under both the law and the Selective Service Regulations, was under the duty of submitting to induction into the armed forces for noncombatant service only. Then the indictment charges the defendant with failing to perform an entirely different duty, and one which under the law he did not owe, by refusing to submit to induction into the armed forces, which, as previously pointed out, under the Universal Military Training and Service Act requires at least four months of adequate military training for service in the armed forces into which he was inducted.

It seems the situation here is in effect the same as it would be in a case where a defendant, after having been found to be physically unfit for any service and placed in Class IV-F by his local board, was ordered by the local board to report for induction and refused to obey the order. Certainly an indictment alleging such facts would not state an offense under the Universal Military Training and Service Act, because the board would be without authority to order the induction of a person classified IV-F.

For the foregoing reasons, It Is Ordered and

this does order that the motion to dismiss the indictment is granted, and said indictment is hereby ordered dismissed.

Done and dated this 7th day of February, 1958.

W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed February 7, 1958.

[Title of District Court and Cause.]

STATEMENT OF DOCKET ENTRIES

1. Indictment for Violation of the Universal Military Training Service Act. (Title 50 App. Sec. 462.) Filed June 7, 1957.
2. Filed Motion to dismiss indictment. Jan. 16, 1958.
3. Plea to indictment of not guilty entered Jan. 16, 1958.
4. Motion to dismiss indictment heard and by the Court taken under advisement. Jan. 16, 1958.
5. Filed and Entered Order granting defendant's motion to dismiss Indictment. Feb. 7, 1958.
6. Notice of Appeal filed March 10, 1958.

Attest:

DEAN O. WOOD,
Clerk.

By N. P. CRONIN,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: The United States of America, in care of the United States Attorney for the District of Montana, Post Office Building, Butte, Montana.

Name and address of appellant's attorney: Krest Cyr, United States Attorney for the District of Montana, Post Office Building, Butte, Montana.

Offense: Richard Harold Hansen, a male person subject to the Universal Military Training and Service Act, registered as required by said Act and regulations promulgated thereunder, and thereafter he became a registrant of Local Board No. 7, said board being then and there duly created and acting, under the Selective Service System established by said Act, in the County of Cascade, in the State and District of Montana; pursuant to said Act, and the rules and regulations promulgated thereunder, Richard Harold Hansen was classified 1-AO, and was notified of said classification; and a notice and order by said board was duly given him to report for induction into the Armed Forces of the United States of America, on January 31, 1957, at Great Falls, County of Cascade, State of Montana, for forwarding to an armed forces induction station; and he was duly forwarded to the Armed Forces induction station at Butte, Montana; and on the 1st day of February, 1957, at Butte, in the State and District of Montana, said Richard Harold Hansen

did knowingly fail, neglect and refuse to perform a duty required of him under said Universal Military Training and Service Act, and the regulations promulgated thereunder, in that said Richard Harold Hansen then and there knowingly failed, neglected and refused to be inducted into the Armed Forces of the United States of America, as so notified and ordered to do.

Concise statement of order, giving date, and any sentence: On February 7, 1958, the Honorable W. D. Murray, District Judge of the above-captioned Court, entered and filed an Order granting the defendant's motion to dismiss the indictment and further ordered said indictment be dismissed. The Order of the Judge is based on a finding that the defendant, who is classified 1-AO by his Local Board as shown in the indictment, was under the duty of submitting to the induction into the Armed Forces for noncombatant service only, whereas the indictment charges the defendant as failing to perform an entirely different duty, and one which under the law the Court finds he did not owe, by refusing to submit to induction into the Armed Forces, which the Court pointed out, under the Universal Military Training and Service Act requires at least four months of adequate military training for service in the armed forces.

Name of institution where defendant now confined: Defendant is not confined, and his bail has been exonerated.

I, the above-named appellant, hereby appeal to

the United States Court of Appeals for the Ninth Circuit from the above stated judgment and order.

Dated this 10th day of March, 1958.

KREST CYR,

United States Attorney for the District of Montana, Attorney for Appellant.

[Endorsed]: Filed March 10, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINT ON APPEAL

The point upon which Appellant, United States of America, will rely on appeal is that the Court erred in dismissing the indictment on file herein, returned against the defendant.

KREST CYR,

United States Attorney for the District of Montana, Attorney for the United States of America, Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 14, 1958.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the United States of America, Appellant, hereby designates for inclusion in the

record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed March 10, 1958, the following, which constitutes the entire record in this action:

1. Indictment for violation of the Universal Military Training Act. (Title 50 App. §462), filed June 7, 1957.

2. Motion to dismiss indictment, filed January 16, 1958.

3. Plea of not guilty to indictment entered January 16, 1958.

4. Hearing on motion to dismiss indictment and by the Court taken under advisement January 16, 1958.

5. Opinion and order of the Court granting defendant's motion to dismiss indictment, February 7, 1958.

6. Notice of appeal filed March 10, 1958.

7. Statement of docket entries.

8. Statement of point on appeal.

9. This designation.

KREST CYR,

United States Attorney for the District of Montana, Attorney for the United States of America, Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 14, 1958.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 18 pages numbered consecutively from 1 to 18 inclusive as a full, true and correct transcript, consisting of copies of the following papers designated by the parties, to wit: Indictment, Motion to Dismiss Indictment, Minute Entry on hearing the Motion to Dismiss Indictment, and Plea and Arraignment, Order of Court Dismissing Indictment, Statement of Docket Entries, Notice of Appeal, Statement of Points on Appeal, Designation of Contents of Record on Appeal, and Clerk's Certificate, required by the rule as the record on appeal in Case No. 3762, United States of America vs. Richard Harold Hansen, as appears from the original records and files of said District Court in my custody as such Clerk.

Witness my hand and the seal of said District Court at Butte, Montana, this 18th day of March, A. D. 1958.

[Seal]

DEAN O. WOOD,

Clerk,

/s/ By HELEN P. HAXSTEAD,

Deputy Clerk.

[Endorsed]: No. 15943. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Richard Harold Hansen, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: March 20, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15943

UNITED STATES OF AMERICA, Appellant,

vs.

RICHARD HAROLD HANSEN, Appellee.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

The Appellant in the above-entitled cause hereby adopts for its Statement of Points and Designation of Record upon which it intends to rely in this appeal the Statement of Points and Designation of Record heretofore and on the 14th day of March, 1958, filed with the Clerk of the United States District Court for the District of Montana, Butte Division, and served upon counsel for the Appellee and

certified by the said Clerk of the District Court to the Clerk of the United States Court of Appeals for the Ninth Circuit, and hereby respectfully requests that said Statement of Points and Designation of Record be allowed and filed in compliance with Rule 17(6) Rules of this Court.

Dated this 26th day of March, 1958.

/s/ KREST CYR,

United States Attorney for the District of Montana, Attorney for United States, Appellant.

Affidavit of Mailing Attached.

[Endorsed]: Filed March 28, 1958. Paul P. O'Brien, Clerk.